

BEFORE THE
POSTAL REGULATORY COMMISSION

Periodic Reporting (UPS Proposal One)

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Docket No. RM2020-9

UNITED PARCEL SERVICE, INC.'S MOTION FOR
RECONSIDERATION OF ORDER NO. 6048
(December 28, 2021)

Pursuant to 39 C.F.R. § 3010.160(a), United Parcel Service, Inc. ("UPS") respectfully requests that the Postal Regulatory Commission ("Commission") reconsider Order No. 6048 (Dkt. No. RM2020-9) ("Seasonality Order"), where it rejected UPS's Proposal One. In the alternative, UPS respectfully requests that the Commission postpone the final entry of Order No. 6048 until the Commission issues its order concerning the appropriate share of institutional costs that must be covered by competitive products (Dkt. No. RM2022-2), and reconsider Order No. 6048 in light of the final order in Dkt. No. RM2022-2.

I. BACKGROUND

On November 29, 2021, the Commission issued Order No. 6048 (Dkt. No. RM2020-9), which rejected a proposal by UPS to change how the Postal Service accounts for peak-season costs and calculates incremental costs.¹ The current deadline to appeal Order No. 6048 is December 29, 2021.²

¹ See Order Rejecting United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies, Dkt. No. RM2020-9 (Nov. 29, 2021) ("Order No. 6048").

² See 39 U.S.C. § 3663 (30-day window to initiate appellate review of final order or decision of the Commission).

Separately, on November 18, 2021, the Commission issued Order No. 6043 (Dkt. No. RM2022-2) regarding its methodology for determining the appropriate share of institutional costs that must be covered by competitive products pursuant to 39 U.S.C. § 3633(a)(3) and in response to the D.C. Circuit’s related remand decision.³ In Order No. 6043, the Commission initiated its third mandatory five-year review of the appropriate share by inviting interested persons to submit comments by February 25, 2022 (and reply comments by March 25, 2022).⁴

II. UPS REQUESTS RECONSIDERATION BECAUSE ORDER NO. 6048 CONTAINS ERRORS OF FACT AND LAW

In Order No. 6048, the Commission committed certain errors that merit reconsideration.

First, the Commission erred in relying on the fact that it had “repeatedly found” that costs uniquely or disproportionately associated with competitive products are “already attributed” to those products under the Commission’s existing cost attribution methodology.⁵ The Commission’s authority for this point was its own Order No. 4963, but the D.C. Circuit vacated Order No. 4963 in 2020.⁶ And the D.C. Circuit specifically rejected the Commission’s theory that the existing cost attribution methodology already accounts for all costs uniquely or disproportionately associated with competitive

³ See Supplemental Notice of Proposed Rulemaking and Order Initiating the Third Review of the Institutional Cost Contribution Requirement for Competitive Products, Dkt. No. RM2022-2 (Nov. 18, 2021) (“Order No. 6043”); *see also United Parcel Serv., Inc. v. Postal Regul. Comm’n*, 955 F.3d 1038 (D.C. Cir. 2020).

⁴ Order No. 6043, at 130.

⁵ Order No. 6048, at 20-21.

⁶ *See United Parcel Serv., Inc. v. Postal Regul. Comm’n*, 955 F.3d at 1041-42 (noting the Commission’s “responsibility under § 3633(b) to ‘consider ... the degree to which *any* costs are uniquely or disproportionately associated with any competitive products’”).

products.⁷ The D.C. Circuit also held that “[o]n remand, the Commission must consider all costs uniquely or disproportionately associated with competitive products in setting the appropriate share, even if it has already accounted for those costs under § 3633(a)(1) and (a)(2).”⁸ The Commission therefore erred as a matter of law in relying on a vacated order and on reasoning that the D.C. Circuit has rejected, and in refusing to analyze to what extent package peak-season costs should be treated as institutional costs and to what extent they are uniquely or disproportionately associated with competitive products.

Second, the Commission failed to adequately consider UPS’s argument that the incremental costs of the Postal Service’s competitive products business should be calculated by determining *all* “costs that could be eliminated if the Postal Service stopped delivering packages.”⁹ As UPS explained, many, if not all, of the increased costs during package peak-season would be eliminated if the Postal Service only processed market-dominant products, not competitive products. Accordingly, under accepted economic principles, those increased costs are incremental costs of the Postal Service’s competitive products business.

Third, the Commission erred in accepting the Postal Service’s claims that the annual December peak-season cost spike is an “institutional cost,”¹⁰ and that the existing cost methodology already reflects the effects of seasonal trends that influence

⁷ *Id.* at 1049 (“[T]he Commission cannot simply *assume* that the ‘uniquely or disproportionately associated with’ standard is subsumed by the ‘reliably identified causal relationships’ standard.”).

⁸ *Id.* at 1051.

⁹ Petition of United Parcel Service, Inc. for the Initiation of Proceedings to Make Changes to Postal Service Costing Methodologies, Dkt. No. RM2020-9 (May 29, 2020), at 3.

¹⁰ Order No. 6048, at 20.

peak-season package delivery.¹¹ Despite conceding that competitive products make significant contributions to December cost spikes, the Commission disregarded UPS's argument showing that the peak-season cost spike has a reliably identified causal relationship with and/or is uniquely or disproportionately associated with competitive products.¹²

For these reasons, Order No. 6048 warrants reconsideration.

III. IN THE ALTERNATIVE, UPS REQUESTS THAT THE COMMISSION POSTPONE ENTRY OF THE SEASONALITY ORDER (RM2020-9) AND RECONSIDER THE ORDER IN LIGHT OF THE ULTIMATE DECISION IN THE APPROPRIATE SHARE DOCKET (RM2022-2)

In the alternative, UPS respectfully requests that the Commission postpone its formal entry of Order No. 6048 (Dkt. No. RM2020-9) until it issues an order in the appropriate share docket (Dkt. No. RM2022-2), and then reconsider Order No. 6048 in light of its decision in the appropriate share docket.

The forthcoming decision in the appropriate share docket will require the Commission to analyze a number of issues central to the questions raised in the present seasonality docket. Key among those issues are whether: (1) current attributable cost methodologies are sufficient to account for major gaps like peak-season costs; (2) the Commission's appropriate share formula offers a robust safeguard that properly covers costs "uniquely or disproportionately" related to competitive products; and (3) the existing incremental cost methodology is flawed for not considering the "but-for" scenario of what the Postal Service's operations would look like if it only processed market-dominant products, not competitive products.

¹¹ Order No. 6048, at 16.

¹² Order No. 6048, at 17-18.

As long as these underlying questions remain open for comment and debate on the appropriate share docket, the Commission should have the opportunity to continue to consider UPS Proposal One concerning peak-season costs. The Commission has invited UPS and other interested parties to file comments in the appropriate share docket, and—because of the overlap in subject matter—comments on the issues identified above necessarily will bear on the merits of UPS Proposal One. Indeed, the Commission’s order in the appropriate share docket specifically invited comments that identified particular costs that are uniquely or disproportionately associated with competitive products, and peak-season costs are one such category.¹³ Thus, issuing a final decision in the present docket before the Commission finishes its review of the appropriate share would prematurely tie the Commission’s own hands to devise a cost attribution methodology for peak-season costs that takes into account all relevant facts and arguments and comports with 39 U.S.C. § 3633(a).

As an added benefit, a postponed final decision in the present seasonality docket may be advantageous to all parties for any appeal. Order No. 6048 will be ripe for appeal under 39 U.S.C. § 3663 whenever the Commission rules on the instant motion, while none of the Commission’s appropriate share decisions will be ripe for appeal until the Commission issues its next appropriate share order in Dkt. No. RM2022-2. Separate appeals of the common issues at stake in these orders would invite duplicative analysis for all parties, lead to judicial inefficiency due to piecemeal litigation, and create the risk of inconsistent rulings that might complicate the Commission’s determination of an appropriate share under § 3633(a).

¹³ Order No. 6043, at 130.

The issues addressed in Order No. 6048 and in Dkt. No. RM2022-2 are closely related; accordingly, the Commission should consider them together. If the Commission declines UPS's motion for reconsideration, UPS requests that the Commission delay the final issuance of Order No. 6048 until the Commission's next appropriate share order in Dkt. No. RM2022-2, so that both decisions have the benefit of full public comment and consideration and, if warranted, can be appealed at the same time.

For the foregoing reasons, UPS respectfully requests that this Motion be granted.

Respectfully submitted,

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